No. 11-823

In the Supreme Court of the United States

STEVEN COREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a scheme to obtain payments from state agencies under public-works construction contracts that were induced by false representations that the contractor met prevailing-wage obligations deprived the agencies of "money or property" within the meaning of the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343.

2. Whether the district court abused its discretion in denying petitioner's motion to withdraw his guilty plea.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is available at 432 Fed. Appx. 38. The opinion of the district court denying petitioner's renewed motion to dismiss the indictment (Pet. App. 6a-28a) is available at 2009 WL 2579260. The opinion of the district court denying petitioner's initial motion to dismiss the indictment (Pet. App. 29a-58a) is available at 2008 WL 4488995.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2011. The petition for a writ of certiorari was filed on December 23, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341; wire fraud, in violation of 18 U.S.C. 1343; money laundering, in violation of 18 U.S.C. 1956(a)(3)(B); money-laundering conspiracy, in violation of 18 U.S.C. 1956(h); and obstruction of justice, in violation of 18 U.S.C. 1512. He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $673,042.03 in restitution. The court of appeals affirmed. Pet. App. 1a-5a; Dist. Ct. J. 4, 6.

1. Construction contracts on public works projects in New York are covered by the Davis-Bacon Act (40 U.S.C. 3142) (Davis-Bacon), and N.Y. Labor Law §§ 220 *et seq*. (McKinney 2009) (Little Davis-Bacon). Government agencies that contract for construction work that is subject to those statutes must include detailed provisions in the contracts that explicitly require contractors to pay workers prevailing wage rates and to provide ongoing certifications that they have been paying prevailing wages during the course of the contract. Pet. App. 30a-32a.

Petitioner, an attorney specializing in labor law, devised and executed a scheme by which government contractors subject to Davis-Bacon and Little Davis-Bacon could fraudulently induce government agencies to pay them money under their contracts in reliance on the false appearance that the contractors were paying their laborers prevailing wages. Petitioner advised the contractors in a scheme to employ lower-wage workers, in violation of the contracts, and to avoid detection by passing money through a trust account petitioner created

(the Contractors Benefit Trust (CBT)), to give the appearance that prevailing wages were being paid through the trust. Petitioner explained to the contractors that they could falsely represent that the CBT provided statutorily-required fringe benefits, and thereby falsely claim that deposits into the CBT were part of the prevailing wages the contractors were paying to their workers. In fact, petitioner and the contractors secretly agreed that the funds deposited in the CBT would not be used to provide benefits to workers on the government projects, and instead would be put to other purposes. In furtherance of the scheme, the contractors filed with the agencies ongoing false certifications of compliance with the prevailing wage requirements in their contracts; in reliance on those false representations, the agencies continued to make payments on those contracts. Pet. App. 33a-35a; Gov't C.A. Br. 3-5.

2. A grand jury in the Eastern District of New York returned a sixteen-count superseding indictment against petitioner charging him with mail fraud, wire fraud, money laundering, money-laundering conspiracy, and obstruction of justice. The mail and wire fraud counts in the indictment alleged that petitioner "did knowingly and intentionally devise a scheme and artifice to defraud [a state or federal agency], and to obtain money and property from [that agency] by means of materially false and fraudulent pretenses, representations and promises." Superseding Indictment 13-16. The introductory paragraphs of the indictment further described the "money and property" of which the victims were defrauded. For example, the indictment alleged:

> Between May 2000 and December 2000, on the advice and counsel, and with the assistance, of [petitioner], [two cooperating witnesses] falsely represented to

> the [New York City Housing Authority] that Corporation-1 and Corporation-2 paid a total of approximately $227,756.42 in fringe benefit contributions on behalf of Corporation-1 and Corporation-2's prevailing wage workers. As a result, approximately $1,851,562.95 in government funds was fraudulently obtained by Corporation-1 and Corporation-2.

Id. at 9; see *id.* at 11-12.

3. Petitioner initially pleaded not guilty, but three days after the trial began, he elected to change his plea to guilty. At the change-of-plea hearing, petitioner was represented by three retained attorneys, one of whom advised the court that he and co-counsel had fully discussed the plea with petitioner. Gov't C.A. App. 112, 115-116. In response to the court's questions, petitioner agreed and stated that he was satisfied with the representation and advice he had received. *Id.* at 116. The district court then obtained background information from petitioner, including that he had received a Master of Laws degree from New York University. *Id.* at 113-114. The court next reviewed all of the charges with petitioner, each of which petitioner stated he understood. *Id.* at 116-120.

The court advised petitioner of the rights he would be giving up if he pleaded guilty. After consulting with his attorneys, petitioner said, "I don't have questions about what you explained to me so far." Gov't C.A. App. 133. The court asked petitioner if he was pleading guilty voluntarily, to which petitioner responded, "Yes." *Id.* at 134.

Petitioner then admitted his guilt of each of the charges in the indictment. Specifically, he admitted: "I advised clients that they could take what I knew to be prevailing wage money that they had been depositing to

the Contractors Benefit Trust and use it for their own personal purposes." Gov't C.A. App. 135. He also admitted: "I advised those clients that they could falsely claim to the Government agencies that they had fully satisfied their obligation to provide fringe benefits to their prevailing wage workers by their contributions to the CBT so they could get paid on certain contracts." *Id.* at 136. The court accepted petitioner's guilty plea.

4. Nearly four months after entering his plea, petitioner, represented by newly retained counsel, filed a motion to dismiss the superseding indictment or, in the alternative, to withdraw his guilty plea. In that motion, petitioner claimed that he had not knowingly entered his plea "because he never intended to deprive the government agencies of money or property or contemplated a loss of the government entities' money or property." Pet. App. 6a (citation omitted). In support of the motion, petitioner provided an affidavit from one of his former lawyers stating that counsel had not considered, or discussed with petitioner, the Second Circuit's decision in *United States* v. *Handakas*, 286 F.3d 92, cert. denied, 537 U.S. 894 (2002). Pet. C.A. App. 110.[1]

The district court denied petitioner's motions to dismiss and withdraw his plea. The court concluded that the indictment adequately alleged a violation of the "money or property" element of the mail and wire fraud statutes because the misrepresentations by the contractors concerned their compliance with the applicable regulatory scheme, a fundamental part of the bargain between the parties. Pet. App. 9a, 11a. The district court

[1] Petitioner also attacked his plea to the money laundering and obstruction charges on the theory that he would not have pleaded guilty to these counts had he known that the fraud charges were defective. Pet. C.A. App. 92.

further found that petitioner's challenge "misses the simplicity of other agency property at issue here—namely, the actual funds that are owned and controlled by the victim agencies that were used in paying [petitioner's] co-conspirators." *Id.* at 12a. As the court concluded, the indictment "unmistakably charges" a deprivation of "money" because "the scheme rested in part on inducing government agencies to make payments to the contractors based on their certifications that workers were receiving the prevailing wage, as required not only by law but contract as well." *Id.* at 13a. The false representations defrauded the agencies not only of the benefit of their contractual bargain, but also induced them to "wrongfully ma[k]e" "payments * * * to the defrauding contractors." *Id.* at 14a.

The court found petitioner's arguments premised on *Handakas* to be "misplaced" because *Handakas* involved the meaning of honest-services fraud, 18 U.S.C. 1346, whereas this case involved money-or-property fraud, 18 U.S.C. 1341 and 1343. Pet. App. 14a. Finally, the court denied petitioner's motion to withdraw his guilty plea, explaining that the "record supports and reflects that [petitioner] had notice of the nature and elements of the charges against him, and, more critically, that he understood those elements at the time of his plea." *Id.* at 18a.

5. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-5a. Agreeing with the district court, the court of appeals first concluded that the indictment adequately alleged the "money or property" element of the fraud charges because (1) "compliance with regulatory or legal regimes can be essential to a bargain, and thus 'property' within the meaning of [Sections] 1341 and 1343," and (2) the false certifications

by the contractors were made, with petitioner's counsel, "in order to receive payment on those contracts," and thereby furthered "a scheme to deprive the state of money or property." *Id.* at 3a. The court therefore determined that petitioner "pleaded guilty to an indictment properly making out a federal offense." *Ibid.* The court also held that "[t]he record belies [petitioner's] argument" that the district court "abused its discretion in denying his motion to withdraw his guilty plea." *Id.* at 4a.

ARGUMENT

Petitioner contends (Pet. 18-39) that his fraudulent scheme did not deprive the victim agencies of "property" within the meaning of the mail and wire fraud statutes, and (Pet. 39-41) that he was inadequately advised of the meaning of "property" before entering his pleas. The court of appeals correctly rejected those arguments, and its unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The mail and wire fraud statutes make it a crime to use the mail or a wire communication to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. The statutes' use of the phrase a "scheme or artifice to defraud" covers "schemes to deprive [people] of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 18-19 (2000) (citation omitted).[2] The "object of

[2] The statutes' separate reference to a scheme or artifice "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. 1341, 1343, modifies the phrase "scheme or artifice to defraud" by clarifying that the statutes "reach[]

the fraud" thus must "be '[money or] property' in the victim's hands." *Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) (brackets in original) (quoting *Cleveland*, 531 U.S. at 26). In this context, "property" encompasses traditional property concepts. Accordingly, an "entitlement to collect money" or a "right to be paid money" qualifies as property, see *id.* at 355-356, as does "confidential business information," *Cleveland*, 531 U.S. at 19 (discussing *Carpenter* v. *United States*, 484 U.S. 19 (1987)). A government's "purely regulatory" interest in an unissued license, on the other hand, is not "property." *Pasquantino*, 544 U.S. at 357 (citing *Cleveland*, 531 U.S. at 22-23 (unissued video poker license not property)).

Applying those principles, the courts below correctly determined that the indictment in this case adequately alleged a violation of Sections 1341 and 1343. As the court of appeals explained, "compliance with regulatory or legal regimes can be essential to a bargain, and thus 'property' within the meaning of" the statutes. Pet. App. 3a. Here, the district court found that "[h]aving work on government owned projects actually done by prevailing wage workers is a fundamental part of the contract that the victim agencies bargained for and expected to receive." *Id.* at 9a. That conclusion is supported by the terms of the contracts—as the district court put it, "how more fundamental to the bargain can a contract provision be than one which the parties agree that, if breached, conveys to the non-breaching party the right to terminate the contract[?]" *Id.* at 10a. It is also supported by the history of Davis-Bacon, which

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false promises and misrepresentations as to the future as well as other frauds involving money or property." *Cleveland*, 531 U.S. at 19, 25-26 (citation omitted).

shows that the statute was intended in part to ensure a higher quality of work on government construction projects. *Id.* at 10a-11a. By falsely certifying compliance with the prevailing-wage requirements, petitioner's co-conspirators thus deprived the government agencies of property under Sections 1341 and 1343. In addition, by using false certifications to obtain payments that otherwise would not have been made, they deprived the agencies of money. *Id.* at 12a.

Petitioner asserts (Pet. 18-19, 26) that the decision below conflicts with this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), but that is incorrect. In *McNally*, the Court held that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government," *id.* at 355, but is instead "limited in scope to the protection of property rights," *id.* at 360. In the wake of *McNally*, Congress enacted Section 1346, which states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to defraud another of the intangible right of honest services." 18 U.S.C. 1346. In *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), this Court held that Section 1346 reaches only bribery and kickback schemes.

Neither *McNally* nor *Skilling* is relevant to this case, however, because petitioner was not indicted on an "honest services" fraud theory but instead on a classic money-or-property theory. Nor, contrary to petitioner's suggestion (Pet. 26), does the decision below conflict with *Carpenter*, which simply clarified that *McNally*'s rejection of an honest-services theory of fraud liability "did not limit the scope of [Section] 1341 to tangible as distinguished from intangible property rights." 484 U.S. at 25; see *id.* at 26 (newspaper's interest in confidential business information is property).

Petitioner further errs in suggesting (Br. 26) a conflict with *Cleveland*. In *Cleveland*, this Court concluded that a fraudulent scheme to obtain licenses from a State to operate video poker machines did not deprive the State of money or property. 531 U.S. at 15. The Court held that an unissued license is not "'property' in the government regulator's hands" and it observed that the State's "core concern" in issuing video poker licenses was "regulatory" rather than revenue-collecting. *Id.* at 20-23. But the Court did not address a situation in which the obligation to comply with a law or regulation arises from a contract with a government agency, nor did it hold that a government agency cannot have property rights subject to protection by the mail fraud statute whenever it acts with a regulatory purpose. To the contrary, even in the context of government regulation, where the government suffers a monetary loss because of fraudulent conduct, its property interests are sufficiently implicated for purposes of the mail fraud statute. For example, the Court held in *Pasquantino* that a foreign government's right to uncollected cigarette taxes is property for purposes of the mail fraud statute. In distinguishing *Cleveland*, the *Pasquantino* Court found "no suggestion in *Cleveland* that the defendant aimed at depriving the State of any money due under the license," thus indicating that even the deprivation of a licensing fee through fraud could support a charge of defrauding a government agency. 544 U.S. at 357.

Viewed in light of that subsequent authority, *Cleveland*'s use of the terms "regulatory," "concern," or "interests," 531 U.S. at 20-21, is appropriately read to refer not to the underlying *motive* of the government agency but rather to the essential economic nature of the right or interest of which the government agency had been

deprived. If a government agency were fraudulently induced to issue a license or some other right that had no economic value before its issuance, there would be no deprivation of money or property. But where, as here, the government entity actually lost money, then it does not matter whether the government's underlying motive was regulatory. And in any event, as the district court noted, the government agencies' interest in compliance with prevailing-wage requirements is not purely regulatory. Pet. App. 11a n.3 ("Quality construction depends on well-trained workers. Contractors who pay prevailing wages ensure that their employees are highly skilled and know how to work safely and productively.") (citation omitted).

3. Petitioner claims (Pet. 32) that the decision in this case conflicts with decisions of the Ninth and Seventh Circuits, but that is incorrect. Petitioner relies on *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), which involved an indictment for wire fraud stemming from a scheme to smuggle computers and communications equipment to Soviet Bloc countries. *Id.* at 466. Bruchhausen engineered the effort by deceiving both the federal government and manufacturers. In reversing the conviction, the Ninth Circuit concluded that the interests of neither the government nor the manufacturers qualified as property. Specifically, the government's "potential forfeiture interest" in seizing the objects was "too ethereal" to come within the statute's reach, *id.* at 467, while the manufacturers' interest in property they no longer owned—"in seeing that the products they sold were not shopped to the Soviet Bloc in violation of federal law"—"is not 'property' of the kind that Congress intended to reach," *id.* at 468. Petitioner also cites *United States* v. *F.J. Vollmer & Co.*, 1 F.3d 1511 (1993),

cert. denied, 510 U.S. 1043 (1994), in which the Seventh Circuit relied on *Bruchhausen* to conclude that "the government's regulatory interests are not protected by the mail fraud statute," *id.* at 1521.

Like *Cleveland*, neither *Bruchhausen* nor *Vollmer* involved a contract with a government agency. Moreover, neither case involved a claim by the government that fraudulent misrepresentations induced the government to pay money to persons otherwise not entitled to receive it. Accordingly, neither case conflicts with the decision below. Indeed, the Seventh Circuit has recognized that false certifications by a government contractor, even as to a regulatory matter, constitute money-or-property fraud. See *United States* v. *Leahy*, 464 F.3d 773, 788 (2006) (false certifications that a contractor complied with minority-business-enterprise requirements constituted a fraud "against Chicago as regulator and also against the city as property holder. The certifications were necessary steps, but they were not the object of the long-ranging fraud. That object was money, plain and simple, taken under false pretenses from the city in its role as a purchaser of services."), cert. denied, 552 U.S. 811 (2007).[3]

3. Petitioner contends (Pet. 39-41) that this Court should review the court of appeals' determination that the district court did not abuse its discretion in denying his motion to withdraw his guilty plea. His claim is

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[3] Petitioner also suggests (Pet. 27-30) that the decision below conflicts with *United States* v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002). As the district court explained, however, *Handakas* is inapposite because it involved alleged honest-services fraud, not money-or-property fraud. Pet. App. 14a. In any event, any intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

based on the assumption (Pet. 40) that counsel failed to adequately discuss the meaning of the "money or property" element of the fraud charges before petitioner entered his guilty plea. The court of appeals concluded otherwise, finding that the transcripts and the record "clearly reflect that, as required by [Fed. R. Crim. P.] 11(b)(1)(G), [petitioner] understood the nature of the charges against him." Pet. App. 4a. That factbound determination does not warrant this Court's review.

Petitioner attempts (Pet. 39) to analogize this case to *Padilla* v. *Kentucky*, 130 S. Ct. 1473 (2010), which involved an attorney's erroneous advice to a defendant that a guilty plea would not subject him to deportation. *Id.* at 1478. But to the extent petitioner contends that his lawyers provided ineffective assistance, his remedy is by way of a motion under 28 U.S.C. 2255 (Supp. IV 2010), not a direct appeal of his conviction. See *Massaro* v. *United States*, 538 U.S. 500, 504-505 (2003). In any event, a showing of ineffective assistance requires both deficient advice and prejudice. *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985). Given that the legal argument that petitioner contends his counsel failed to consider—"the 'property' element of the fraud statute" (Pet. 40)—lacks merit, petitioner could not establish either deficient performance or prejudice, *i.e.*, "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on [continuing with his] trial." *Id.* at 59.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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